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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

PETITIONER'S REPLY BRIEF.

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The crux of respondent's brief consists of a series of statements which in effect concede the principal argument in our petition. We have pointed out that in the absence of the instruction refused below, there is a compelling tendency on the part of juries to offset the presumed effect of income taxes on damage awards by increasing the award to the extent deemed necessary to give plaintiff the net amount intended, after taxes. If such in fact is the effect of a refusal to render this instruction when offered, then a situation of vital concern to this court is presented, inasmuch as the Federal Employers'

Liability Act is thereby made the vehicle for the recovery of damage awards far in excess of the compensatory measure intended by Congress and established by numerous decisions of this Court (Pet. 7, 8).

That an increase in damage awards in fact results from the refusal of the instant instruction is repeatedly recognized in respondent's brief. The import of this recognition is undoubtedly increased when counsel's broad experience in the trial of personal injury matters is considered.

Respondent's complete agreement with this vital phase of our argument is expressed at the outset of respondent's brief by the restatement of the question in this form (Res. 1):

> "Can a defendant in any personal injury action mitigate the measure of damages by requesting the court to instruct the jury in a personal injury action that the award is not subject to income tax?"

Thereafter respondent further states at page 10:

> "To permit a jury to consider the income tax exemption of the injured in assessing damages against his employer, who must be culpable on the basis of common law damages, is to permit the employer to employ the Internal Revenue Code, designed for the benefit of the injured, to mitigate the damages."

Thus in again conceding that a jury's knowledge of the Internal Revenue Code will result in mitigation of damages, respondent also suggests that plaintiffs have a type of vested right in keeping juries ignorant of the simple fact that personal injury damage awards are nontaxable. For obvious reasons, respondent argues that nothing should be permitted to occur which might impair this basic misunderstanding by the jury.

Respondent again urges at page 11:

> "But why should a tort feasor be allowed to mitigate damages by virtue of the fact that the injured has to pay income taxes on his earnings or that what he receives as an award is free from taxation."

This statement further typifies respondent's approach to the issue in this case, which approach is characterized by a refusal to distinguish between the mitigation of damages by an amount to which a plaintiff might be entitled as compensation for injuries, and mitigation by an amount far in excess of any compensatory damages intended by the jury. It is apparently respondent's position that all measures calculated to mitigate damages are equally reprehensible, even where the proposed reduction consists of nothing other than the elimination of an undeserved and unintended windfall.

Respondent also seeks to equate a simple instruction concerning the effect of the federal income tax on damage awards with the jury's being informed of pensions or insurance awards from which an injured plaintiff might benefit. Such benefits, of course, constitute partial compensation for injuries suffered. As respondent correctly suggests, it is generally considered improper to inform the jury of such benefits because of a possible tendency by the jury to limit damages against a defendant to an amount necessary to make up the difference between the total compensation intended and the benefits otherwise received (Res. 11). The purpose of this rule of law is to hold tort-feasors liable for compensation for the full extent of injuries caused. In this basic respect, the rule cited by respondent and the instruction offered below serve the identical purpose, for the sole effect of the jury's certain knowledge of the non-taxability of damage awards

is to preclude the allowance of an additional amount of damages deemed necessary by the jury to offset the erroneously presumed effect of income taxes. The result in both cases is to effectuate to a greater degree the frequently announced principle that the proper measure of damages and of a tort-feasor's liability is compensation for injuries received, no more and no less.

In this regard respondent also suggests that if the instruction in issue is proper, then it is equally proper to instruct that any damage award paid by a defendant corporation is deductible from gross revenue for income tax purposes (Res. 11). Here respondent is plainly in error. Aside from the fact that the instruction would be accurate only if the corporation reported net profits, the more basic objection is that the law is not concerned with the economic effect on a tort feasor of its paying a damage award in an amount necessary to compensate the injured plaintiff. Such an instruction would in fact be identical in principle with informing the jury that defendant is insured and will suffer no out-of-pocket loss.

Respondent also argues that the question presented in the petition is a pure common law question, not limited to the measure of damages in F.E.L.A. cases. To this observation petitioner demurs. In *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485 (Pet. 8), the question decided was similarly applicable to all common law actions for damages resulting from personal injuries. There, this Court did not hesitate to apply to the measure of damages in F.E.L.A. cases, well-established common law principles having general application to personal injury actions. The *Kelly* case holds that the giving of an instruction defining the elements of dam-

ages was not sufficient to cure the trial court's error in refusing a present value instruction. That case effectively disposes of the contention made on page 3 of respondent's brief that so long as the instructions define the elements of damages proper for the consideration of the jury, there can be no complaint.

In that portion of its brief captioned "The Congressional Intent", respondent asserts that our argument should be addressed to Congress rather than to this Court. Respondent apparently misconstrues our position. We do not suggest that this Court override the Internal Revenue Code in any respect. We only argue that fairness to defendants requires that the jury be advised accurately as to the effect of the law on damage awards. Certainly it is not the function of Congress or of the legislative branch to prescribe the instructions to be given by courts in personal injury actions. It is no more the function of Congress to legislate on the question presented here, than it would have been to have passed a law requiring the instruction upheld in the *Kelly* case, regarding the discounting of future earnings to present value.

By way of summary it may be said that the utter inconsistency of respondent's entire argument is reflected in the following observations. Respondent states that it must be presumed that the jury will do its duty and determine any damages in accordance with the law (Res. 5). If such is the case, then the jury should be presumed to have considered that damage awards for personal injuries are not subject to the income tax. Thus, respondent might have been expected to urge that any instruction tending to vest the jury with certain knowledge of this fact would have no effect in the fixing

of damages. Yet respondent has repeatedly asserted that if such information is given to the jury, the inevitable result is to lessen the amount of damages awarded. We can scarcely conceive of a more persuasive statement of the intrinsic logic of our position, for here is respondent's own admission that in the absence of the instruction here in issue, juries will inevitably tend to award damages in excess of the actual compensation intended.

We respectfully submit that proper administration of the Federal Employers' Liability Act requires action by this Court to terminate this particular cause of excessive damage awards which even respondent concedes to exist.

Conclusion.

Wherefore, for the reasons stated above and in the original petition, petitioner prays that this Court issue a writ of certiorari to review and reverse the judgment in this case of the Appellate Court of the State of Illinois, First District.

Respectfully submitted,

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